

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

McNULTY BROTHERS COMPANY¹

Employer

and

OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION, LOCAL 5, AFL-CIO

Petitioner

and

INTERNATIONAL UNION OF BRICKLAYERS & ALLIED CRAFTWORKERS, LOCALS 56 AND 74, AFL-CIO

Intervenors

Case 13-RC-20534

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record² in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.³

3. The labor organization(s) involved claim(s) to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:⁴

All full-time and regular part-time plasterers' journeymen and plasterers' apprentices employed by the Employer from its facility currently located at 2009 South Lumber Street, Chicago, Illinois, excluding office clerical employees and guards, professional employees and supervisors as defined by the Act.

DIRECTION OF ELECTION*

An election by secret ballot shall be conducted by the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. In addition, all employees who have been employed for a total of 30 days

or more within the 12-month period immediately preceding the eligibility date for the election, or have had some employment in that period and have been employed 45 days or more within the 24-month period immediately preceding the eligibility date, are also eligible. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Operative Plasterers and Cement Masons International Association, Local 5, AFL-CIO **and** International Union of Bricklayers & Allied Craftworkers, Locals 56 and 74, AFL-CIO⁵, **or** neither.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of the full name of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision 2 copies of an election eligibility list, containing the full names and addresses of all of the eligible voters, shall be filed by the Employer with the undersigned Regional Director who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in **Suite 800, 200 West Adams Street, Chicago, Illinois 60606** on or before March 16, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court Building, 1099-14th Street, N.W., Washington, D.C. 20570**. This request must be received by the Board in Washington by March 23, 2001.

DATED March 9, 2001 at Chicago, Illinois.

/s/ Elizabeth Kinney
Regional Director, Region 13

⁵/ The National Labor Relations Board provides the following rule with respect to the posting of election notices:

(a) Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Director in the mail. In all cases, the notices shall remain posted until the end of the election.

(b) The term "working day" shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays.

(c) A party shall be estopped from objection to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Director at least 5 working days prior to the commencement of the election that it has not received copies of the election notice.

1/ The parties stipulated that the International Union of Bricklayers & Allied Craftworkers, Locals 56 and 74, AFL-CIO (herein collectively referred to as the Intervenor and singularly as Bricklayers Locals 56 and Local 74) were proper Intervenor in this proceeding based upon having current collective bargaining agreements with the Employer covering the employees sought by the Petitioner in the instant petition.

2/ The arguments advanced by the parties at the hearing and in their post-hearing briefs have been carefully considered.

3/ The Employer is a corporation engaged in construction.

4/ The Petitioner (herein referred to as Petitioner or Local 5) has a collective bargaining agreement with the Employer pursuant to Section 8(f) of the Act covering the employees it seeks to represent under Section 9(a) through the instant petition. The 8(f) agreement between the Petitioner and the Employer is a multi-employer association agreement through the Association of Wall and Ceiling Contractors, Chips and Dry Wall Contractors of Northern Illinois (herein the Association). Due to agreements between the International Unions of the Petitioner (International Association of Operative Plasterers and Cement Masons, herein the "Operative Plasterers" and the Intervenor (International Union of Bricklayers & Allied Craftworkers, herein the "Bricklayers"), establishing certain geographical limitations on each other where there was overlapping coverage of job classifications, the 8(f) collective bargaining agreements between the Petitioner and the Employer have not been applicable to plastering work performed by the Employer in DuPage County, Illinois. In DuPage County, the work performed by the employees covered by the instant petition has been under the jurisdiction of Bricklayers Locals 56 and 74 which also have 8(f) Association collective bargaining agreements with the Employer with regard to work in DuPage County. The record reflects that the Employer has had 8(f) relationships with the Petitioner for at least 16 years. The record does not disclose how long the Employer has had a similar 8(f) relationship with the Intervenor.

In 1998, the Operative Plasterers unilaterally revoked its agreement with the Bricklayers regarding geographical restrictions. This action by the Operative Plasterers was upheld at the convention of the Building and Construction Trades Department of the AFL-CIO in July, 2000. Thereafter, the Operative Plasterers authorized the Petitioner to expand its geographic jurisdiction, including DuPage County. As a result, the Petitioner filed the instant petition seeking to become the certified representative under Section 9(a) of the Act of the employees of the Employer covered by its 8(f) collective bargaining agreement with the Employer, without regard to the previous geographical restrictions. The Petitioner contends the unit it seeks to represent herein is an appropriate single employer unit in which the employees share a sufficient community of interests. The Intervenor, on the other hand, contend that the unit sought by the Petitioner is inappropriate as it is broader than that which the Petitioner has historically represented through its 8(f) agreements with Employer, asserting that the history of collective bargaining under Section 8(f) of the Act is controlling as to the scope of the unit under Board precedent. Accordingly, the Intervenor asserts that petition must be dismissed, or alternatively, that the unit description be amended to exclude DuPage County from its scope to conform the unit to its historical scope. The Employer agrees with the

Petitioner that the unit sought is appropriate, however, it asserts that the unit description should include the geographic determinations now covered by the Petitioner.

FACTS

McNulty Brothers Business Operations

The Employer is engaged in performing plastering work in the Chicago metropolitan area. Its only facility is located in Chicago, Illinois. Joseph Feldner is the President of the Employer. In addition to the President, the Employer's management structure includes "contractors" who obtain work, and three superintendents who have the ability to hire and fire employees, and who dispatch and assign employees to work at various work sites. These superintendents are the only individuals with authority to drive the company van or truck. They make sure the employees have the supplies needed and make adjustments when employees are sick.

The Employer has approximately 150 employees, including 4 plasterers at the present time. The normal complement of plasterers is general from four to six plasterers, however, the Employer has employed as many as 12 plasterers, depending on the amount of available work. The Employer utilizes the Local 5 apprenticeship school and its hiring hall. Feldner testified that he was not sure whether it ever consulted the Bricklayers Local 54 or 76 for the same services. The superintendents also keep a list of employees who have been recommended through word of mouth. In terms of the Employer's normal business cycle, it normally has six jobs being performed simultaneously and completes about 20 to 30 jobs per year. In the past two years, the Employer has completed work in Cook, DuPage, Kane, Will, LaSalle, Livingston, Kendall, DeKalb, Grundy and McHenry Counties as well as in Detroit, Michigan. Feldner could not testify whether the work in all these counties included the plasterers. However, he was able to testify that the plasterers have worked on jobs in Cook and DuPage Counties and that they did not work on the job in Detroit, Michigan.

According to the Employer's witness, all plasterers perform the same work. They may work together on one job site or they may work separately on different job sites, depending on the number and nature of the jobs that the Employer has at any given time. Employees are assigned to jobs based on the complexity and scope of the job, not upon the job situs, the employees' local union membership, or the geographical coverage of any particular local union. Generally, the plasterers report to work at the job site to which they are assigned, however, Feldner testified that they also regularly go to the Employer's Chicago office. The plasterers are commonly supervised by the three superintendants, whose responsibilities are not apportioned on the basis of any particular county boundaries. The plasterers generally have a continuity of employment with the Employer and go from job site to job site. Feldner testified that plasterers let go for a lack of work have an expectancy of being rehired when work picks up.

The record does not disclose what whether the Employer maintains different wage scales and fringe benefit payments for the plasterers dependent upon whether they are performing work in DuPage County under the jurisdiction of the Intervenor or in the other counties in Northern Illinois under the jurisdiction of the Petitioner. Feldner testified that he did not know if there were any differences in pay and fringe benefits depending upon whether the work was located in DuPage County. He did testify that he was aware of and believed in the terms “the money follows the man” - meaning that the “money [for the fringe benefit funds] goes to the Local where the man is a member of”. Documents entered into the record showed that the Bricklayers and Plasterers benefit fund administrators signed reciprocal agreements agreeing to forward the proper contributions to each other if they were received by either party in error.

ANALYSIS

I. Appropriateness of the Bargaining Unit

Section 9(b) of the National Labor Relations Act directs the Board to “decide in each case whether, in order to assure employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .” “[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board whose decision, ‘if not final, is rarely to be disturbed.’” *South Prairie Construction v. Operating Engineers Local 627*, 425 U.S. 800, 805 (1976)(citation omitted). There is nothing in the Act that requires the unit for bargaining be the only appropriate unit or the most appropriate unit – the Act only requires that the unit for bargaining be appropriate so as to assure employees the fullest freedom in exercising the rights guaranteed by the Act. *Overnite Transportation Co.* 322 NLRB 723 (1996); *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenix Resort Corp.*, 308 NLRB 826 (1992). In defining the appropriate bargaining unit to ensure employees the fullest freedom in exercising the rights guaranteed by the Act, the key question is whether the employees share a sufficient community of interest. *Alois Box Co., Inc.*, 326 NLRB 1177 (1998); *Washington Palm, Inc.*, 314 NLRB 1122, 1127 (1994).

In determining whether employees share a sufficient community of interests to constitute an appropriate unit, the Board weighs various factors, including the similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the Employer’s other construction sites; and the extent of the parties’ bargaining history. *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988), citing *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965). Also, the Board will consider a difference in method of wages or compensation; different hours of work; different employment benefits; separate supervision; the degree of similar or dissimilar qualifications, training and skills; differences in job functions; amount of working time spent away from the facility; and integration of work functions. *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962); *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 647-648 (2d Cir. 1996).

It is clear that the unit petitioned for herein would, upon application of the foregoing community of interest factors, be found to be an appropriate unit for collective bargaining, in the absence of any consideration of the history of collective bargaining. Thus, the record shows that the petitioned for unit constitutes all of the plasterers of a single Employer operating out of one facility located in Chicago, Illinois. The Employer's plasterers are engaged in shared and clearly identifiable job functions and share the same terms and conditions of employmentⁱ. Any differences in wages and fringe benefits that may exist for the Employer's jobs in DuPage County other counties in Northern Illinois is difference that all the Employer's plasterers share, and this factor, to the extent exists herein, has created no distinctions among the plasterers and their shared community of interests.

The Intervenor, however, contend that the petitioned-for unit is inappropriate because it is broader in scope than the historical bargaining unit in the 8(f) collective bargaining agreements between the Petitioner and the Employer. The Intervenor, based upon the following language in the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375, 1377 (1987), assert that the scope of the petitioned-for unit must be the same as that in the 8(f) agreement between the Petitioner and the Employer:

[S]uch agreements [8f] will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e). . . in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement. . . .

The Intervenor assert that Board's decision in *P.J. Dick Contracting, Inc.*, 290 NLRB 150 (1988) supports its view that where there is a historical relationship under Section 8(f) of the Act, the Board's decision in *Deklewa* requires that the scope of the petitioned-for unit be the same as that found in the 8(f) agreement. In *P.J. Dick Contracting, Inc.*, the Board rejected the petitioning union's request for a unit covering 33 counties, finding that the petitioning union's alternative request for a unit confined to the 11 counties it had covered in its 8(f) agreements with the employer to be appropriate. In reaching that conclusion, the Board stated:

[T]he Board's traditional deference to bargaining history is generally applicable in the construction industry. Indeed based on the limited evidence presented, it is the determinative factor in finding in this case that the 11 county jurisdiction of the MBA agreement is the appropriate unit.
Id. at 151

While it is clear, based upon the foregoing, that bargaining history is a factor to be weighed and considering in determining whether a petitioned for unit is appropriate, I

ⁱ No party herein has taken a position that the journeymen and apprentice plasterers do not constitute a clearly identifiable group of construction employees engaged in clearly identifiable and distinct job functions. *Laborers (R.B. Butler, Inc.)*, 160 NLRB 1595 (1966)

find that the Intervenor's reading of *Deklewa* language to be too restrictive. Bargaining history pursuant to 8(f) agreements is not the conclusive consideration in determining whether a petitioned-for unit is appropriate. The very language that the Board used in *Deklewa*, 282 NLRB 1375, 1377-78 (1987) "the appropriate unit *normally will be* the single employer's employees covered by the agreement" (emphasis added), clearly sets forth that 8(f) agreement unit is not necessarily conclusive as to the determination of the appropriate unit. Furthermore, the language in *Deklewa* cited by the Intervenor was used by the Board to express its rejection of the merger doctrine in 8(f) situations, rather than to define the scope of single employer units. Under the merger doctrine, the employees of a single employer that belonged to a multi-employer bargaining association were merged into a multi-employer bargaining unit. As such, the employees of the single employer could only exercise their right to select their bargaining representative in conjunction with all the other employees of the other employers who were included in the multi-employer bargaining unit. In *Deklewa*, the Board rejected the merger doctrine's application to representation petitions where the employees had been covered by multi-employer agreements under Section 8(f) of the Act in order to allow the employees of a single employer an opportunity to exercise their Section 7 rights to vote on whether to accept or reject the 8(f) bargaining representative. See *City Electric, Inc.*, 288 NLRB 443, fn. 9 (1988). Thus, it is clear that Board's language in *Deklewa*, cited by the Intervenor, was not meant to limit the scope of a single employer unit in the construction industry under Section 9(b) of the Act to the unit defined by the previous 8(f) bargaining agreement.

The Board's decision in *P.J. Dick Contracting, Inc.*, *supra*, also makes it clear that, while 8(f) bargaining history is a factor to be weighed in determining the appropriate unit, it is not conclusive. In finding the historical unit to be appropriate, the Board did not find that its decision in *Deklewa* compelled a finding that only the historical unit was appropriate. Rather, the Board made it clear that the broader unit sought by the petitioner might be appropriate; however, the Board found that the petitioner had failed to present any evidence to demonstrate its appropriateness. *P.J. Dick Contracting, supra*, at fn. 8.

While the Board gives substantial weight to bargaining history in furtherance of the statutory objective of stability in industrial relations, I find no basis on the record for giving the bargaining history involved herein weight over the other community of interests factors that make the unit sought by the Petitioner otherwise appropriate. The record is simply insufficient to conclude that the historical geographical exclusions of the employees of the Employer when they work in certain counties from coverage of the 8(f) agreements between the Petitioner and the Employer has a discernable impact upon the employees and their community of interest. There simply is no record evidence to conclude that the geographical exclusions, as a practical matter, have made a difference to the employees of the Employer with regard to their terms and conditions of employment or created any distinctions among the plasterers community of interests.

To find as the Intervenor's contend, that the unit sought by the Petitioner must under Section 9(b) of the Act be confined geographically to the unit Petitioner represented under the 8(f) agreements only serves, on the facts herein, to perpetuate an

arbitrary geographical division of employees into separate units based upon where they are working. The only basis on the record in the instant case for the historical geographical division of the units between the Petitioner and the Intervenor were political considerations of maintaining geographical integrity for the local unions without competition among the local unions regarding the representation of employees. The record evidence does not show that the geographical divisions have anything to do with the terms and conditions of employees whom these locals represent. Herein, it is the same group of employees working under the same general terms and conditions of employment whom the Intervenor would divide into different units depending solely on what county that they happen to be working in.

It is the opinion of the undersigned, based upon the foregoing, that there is no basis for affording the 8(f) bargaining history between the parties controlling weight over the significant shared community of interests that exists in the unit sought by the Petitioner. In *A.C. Pavement Striping Company, Inc.*, 296 NLRB 206, 210 (1989), the Board adopted the decision of Acting Regional Director which set forth in relevant part:

“The Board has long given substantial, but not conclusive, weight to a prior history of collective bargaining. *General Electric Company*, 107 NLRB 70, 72 (1953). In *John Deklewa and Sons*, *supra*, the Board set forth that in making unit determinations where the employees in question were covered by 8(f) agreements, the appropriate unit will normally be the unit as defined in the agreements. Nevertheless, the Board has also long held that it will not give controlling weight to a history of collective bargaining ‘to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units.’ *Williams J. Keller, Inc.*, 198 NLRB 1144, 1145 (1972). Herein, the record shows no rational basis exists for the two historical units other than being purely historical accidents.”

In sum, the record herein demonstrates no rational basis for continuing the geographical division of the same groupings of employees into different units based upon local union jurisdictions. Accordingly, based upon the foregoing and the entire record herein, I find that the unit sought by the Petitioner is not limited to that previously covered under its 8(f) agreement with the Employer and that the unit may appropriately include plasterers working in DuPage County. Similarly, with regard to the Employer’s request at the hearing that the unit description should include 10 counties in northern Illinois which appears to be based upon the Petitioner’s jurisdiction, the Board has long held that a union’s territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit. *Groendyke Transport*, 171 NLRB 997, 998 (1968); *CCI Construction Co., Inc.*, 326 NLRB 1319 (1998). Accordingly, I find the unit sought by the Petitioner to be appropriate and I will not include either the geographical limitation regarding DuPage County sought by the Intervenor nor the Petitioner’s territorial jurisdiction as sought by the Employer in the unit’s description. Inasmuch as I have rejected both the Intervenor’s and the Employer’s geographical limitations in defining the unit; no party raises any other issues regarding the description of the unit’s scope; the

Employer operates from a single location; and the unit found appropriate encompasses all of the Employer's plasterers who have a continuity of employment with the Employer and share a substantial community of interests regardless of job location, I find no basis to define the unit or limit the unit in any other geographical terms that might be appropriate in different circumstances. See, *Oklahoma Installation Co.*, 305 NLRB 812 (1991).

5/ International Union of Bricklayers & Allied Craftworkers, Locals 6, 56, and 74, AFL-CIO have indicated that with regard to the instant Employer they wish to appear on the ballot as one choice, e.g., if selected by the employees they would be the joint representatives of the unit. Accordingly, based upon Local 6's 8(f) agreement with the Employer and the desire of these three locals to appear as one choice on the ballot rather than competing with each other, as well as with the Petitioner, International Union of Bricklayers & Allied Craftworkers, Locals 6, 56, and 74, AFL-CIO will appear on the ballot as one choice, with the other choices being the Petitioner and neither.

401-7550; 420-1227;
420-1787; 440-3350